NESTRA PLANTATIONS SDN BHD v. FADZILLAH ABD RAHMAN & ORS

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
VARGHESE GEORGE JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: T-02(IM)(NCVC)-684-04-2014]
7 JUNE 2016

COMPANY LAW: *Winding up – Suit by company – Change of legal firm representing wound up company – Whether subsequent legal firm obtained sanction of official receiver – Whether subsequent legal firm had authority to act for company – Whether consent order obtained by subsequent legal firm without sanction of official receiver – Whether a nullity and ought to be set aside*

The appellant ('the first plaintiff') was wound up and its affairs and property were vested in the hands of the official receiver ('OR'). Through the OR, the first plaintiff filed a suit against all the defendants at the High Court for, among others, a declaration that the appointment of the third respondent ('the second defendant') and the fourth respondent ('the third defendant') as the directors of the fifth respondent ('the fifth defendant') was unlawful and be revoked. The first plaintiff also sought for a declaration that the issue and registration of shares in the fifth defendant in favour of the second defendant and the third defendants was unlawful and ought to be revoked. The basis of the OR's claim was that, *inter alia*, the issuance of new shares to the second and third defendants in the fifth defendant was unlawful and illegal because the fifth defendant was under receivership and under such circumstance, no new shares could be issued. The solicitors in action at that time was Messrs Wan Jawahir & Co who obtained sanction from the OR to act on behalf of the first plaintiff. Subsequently, Messrs Ahmad Rastom & Nayagam took over the matter from Messrs Wan Jawahir & Co. Messrs Ahmad Rastom & Nayagam and then entered into a consent order with the defendants and agreed to withdraw the main suit of the first plaintiff without liberty to file afresh. Dissatisfied, the first plaintiff filed an application for a declaration that Messrs Rastom & Nayagam had no sanction or authority to act for the first plaintiff *vide* encl. 46A and also applied to set aside the consent order, *vide* encl. 46B. The supporting affidavit of encl. 46A was affirmed by one Ahmad Fauzi. Ahmad Fauzi averred that Messrs Ahmad Rastom & Nayagam had not obtained any sanction from the OR. The defendants took umbrage to the said averment and argued that as that fact was within the knowledge of the OR, only the latter could state such averment. Further, the defendants argued that it was not shown in the affidavit by Ahmad Fauzi that he had the authority from the OR to aver that crucial fact regarding the status of Messrs Ahmad Rastom & Nayagam in relation to the sanction issue on its behalf. The High Court dismissed both the first plaintiff's applications. Hence the

present appeal. The issues that arose for determination were (i) whether Messrs Ahmad Rastom & Nayagam had been validly appointed to act for the first plaintiff as they did not have the sanction from the OR; and (ii) if the plaintiff had not obtained the necessary sanction from the OR, whether the said consent order would be a nullity and ought to be set aside.

Held (dismissing appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The sanction from the OR must be given to a specific solicitor to act accordingly. It was not open to the prior sanctioned solicitor to simply discharge himself and then appoint another solicitor to further act in his place without the new solicitor having first obtained the requisite sanction of the OR. (para 13)

(2) Any information pertaining to the issuance of a sanction must emanate from the Jabatan Insolvensi Malaysia. The present facts, did not exhibit such situation. Despite having written to the OR, Messrs Ahmad Rastom & Nayagam had not received any response from the OR. Therefore, the status of the firm could only be determined directly by the necessary averment to that effect by the OR. The evidence as it stood as per the affidavit in support by Ahmad Fauzi could not forward the first plaintiff's case any further in discharging the burden on it of proving that the said legal firm had not obtained the necessary sanction to act the way it did. (para 23)

(3) There was no evidence from the first plaintiff that Messrs Ahmad Rastom & Nayagam had not obtained the necessary sanction from the OR. A court order, however imperfect, would remain valid and enforceable until it is set aside. However, there was nothing to prevent the first plaintiff from starting a writ action to prosecute its case against the defendants for the reliefs that it had sought for. (paras 24 & 25)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif pertama') telah digulung dan hal ehwal serta harta plaintif pertama terletak dalam tangan pegawai penerima ('OR'). Melalui OR, plaintif pertama memfailkan tindakan guaman terhadap kesemua defendan di Mahkamah Tinggi, antara lain, untuk satu deklarasi bahawa pelantikan responden ketiga ('defendan kedua') dan keempat ('defendan ketiga') sebagai pengarah responden kelima ('defendan kelima') adalah tidak sah dan terbatal. Plaintif pertama juga memohon untuk perisytiharan bahawa pengeluaran dan pendaftaran saham defendan kelima yang menyebelahi defendan kedua dan ketiga tidak sah dan terbatal. Asas tuntutan OR adalah bahawa, antara lain, pengeluaran saham baharu kepada defendan kedua dan ketiga dalam defendan kelima tidak sah dan menyalahi undang-undang kerana defendan kelima berada di bawah kuasa penerima dan dalam keadaan ini, tiada saham baru boleh dikeluarkan. Peguam cara pada masa tersebut iaitu Tetuan Wan Jawahir & Co telah mendapat kebenaran daripada OR untuk bertindak bagi

pihak plaintif pertama. Kemudian, Tetuan Ahmad Rastom & Nayagam mengambil alih daripada Tetuan Wan Jawahir & Co. Tetuan Ahmad Rastom & Nayagam seterusnya memeterai perintah persetujuan dengan defendan-defendan dan bersetuju menarik balik tindakan guaman utama plaintif pertama tanpa kebebasan untuk memfail semula. Tidak berpuas hati, plaintif pertama memfailkan permohonan bagi mendapatkan perisytiharan bahawa Tetuan Rastom & Nayagam tidak mempunyai kebenaran untuk bertindak bagi pihak plaintif pertama melalui lampiran 46A dan juga memohon untuk mengetepikan perintah kebenaran melalui lampiran 46B. Afidavit sokongan lampiran 46A disahkan oleh seorang bernama Ahmad Fauzi. Ahmad Fauzi menegaskan bahawa Tetuan Ahmad Rastom & Nayagam tidak mendapat apa-apa kebenaran daripada OR. Defendan terkilan dengan penegasan tersebut dan menghujahkan bahawa oleh kerana fakta tersebut diketahui OR, hanya OR yang boleh menyatakannya. Di samping itu, defendan-defendan menghujahkan bahawa tidak ditunjukkan dalam afidavit Ahmad Fauzi bahawa dia mendapat kebenaran daripada OR untuk menegaskan fakta penting mengenai status Tetuan Ahmad Rastom & Nayagam berhubung isu kebenaran bagi pihaknya. Mahkamah Tinggi menolak kedua-dua permohonan plaintif pertama. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk penentuan adalah (i) sama ada Tetuan Ahmad Rastom & Nayagam dilantik secara sah untuk bertindak bagi plaintif pertama kerana tidak mempunyai kebenaran daripada OR; dan (ii) jika plaintif tidak mendapat kebenaran yang diperlukan daripada OR, sama ada perintah persetujuan terbatal dan harus diketepikan.

Diputuskan (menolak rayuan dengan kos)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Kebenaran daripada OR harus diberi kepada peguam cara tertentu untuk bertindak sewajarnya. Tidak terbuka kepada peguam cara lama yang telah diberi kebenaran untuk melepaskan dirinya dan kemudian melantik seorang peguam cara baharu untuk mengganti tempatnya tanpa mendapatkan kebenaran yang diperlukan daripada OR terlebih dahulu.

(2) Apa-apa maklumat berkaitan pengeluaran kebenaran harus diperolehi daripada Jabatan Insolvensi Malaysia. Fakta kes ini tidak menunjukkan keadaan tersebut. Walaupun telah menulis surat kepada OR, Tetuan Ahmad Rastom & Nayagam tidak menerima apa-apa maklum balas daripada OR. Oleh itu, status firma tersebut hanya boleh ditentukan secara langsung oleh OR. Keterangan seperti yang terkandung dalam afidavit sokongan Ahmad Fauzi tidak dapat mengukuhkan kes plaintif pertama dalam melepaskan beban membuktikan bahawa firma tersebut tidak mendapat kebenaran yang diperlukan untuk bertindak dengan cara yang dilakukan.

(3) Tidak ada keterangan daripada plaintif pertama bahawa Tetuan Ahmad Rastom & Nayagam tidak mendapat kebenaran yang diperlukan daripada OR. Sesuatu perintah mahkamah, walaupun tidak sempurna,

tetap sah dan boleh dikuatkuasakan sehingga diketepikan. Walau bagaimanapun, tiada apa-apa yang menghalang plaintif pertama daripada memulakan tindakan writ untuk mendakwa kesnya terhadap defendan-defendan bagi mendapatkan relief yang dipohon.

Case(s) referred to:

*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC **(refd)***

For the appellant - Harpal Singh Grewal, Jargit Singh & Reny Rao; M/s Mohamed, Jargit & Partners

For the 1st respondent - Mohd Azhar Awang; M/s Ahmad Rastom & Nayagam

For the 2nd-5th respondents - Gunaseelan & Asmawati Ab Manaf; M/s Zahir Razak & Co

[Editor's note: Appeal from High Court, Kuala Terengganu; Civil Suit No: 22NCVC-03-01-2012 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] Nestra Plantation Sdn Bhd ("the first plaintiff") was wound up and its affairs and property are in the hands of the liquidator/official receiver ("OR").

[2] Mohamad bin Awang (deceased/"the first defendant") was a shareholder in the first plaintiff and one of the directors in Lemo Sdn Bhd ("the fifth defendant). The first defendant was adjudicated bankrupt on 15 December 1993.

[3] The fifth defendant is a private limited company which was under receivership under a debenture held by Bank Pertanian Bhd. The fifth defendant is the owner of an oil palm estate in Terengganu. The original shareholders in the fifth defendant were the first plaintiff and the estate of one Leong Wan Yin.

[4] The first defendant, while still an undischarged bankrupt, had unlawfully caused the issue and registration of new shares in that fifth defendant in favour of the Khuzamy Musa bin Muhammad ("the second defendant) and Khuzairy Musa bin Muhammad ("the third defendant"), and subsequently caused the second and third defendants to be unlawfully appointed as directors of the fifth defendant.

[5] Through the OR, the first plaintiff filed a suit against all the defendants for among other, a declaration that the appointment of the second defendant and the third defendant as the directors of the fifth defendant was unlawful

and be revoked. The first plaintiff also sought for a declaration that the issue and registration of shares in the fifth defendant in favour of the second and the third defendants was unlawful and ought to be revoked.

[6] The basis of the OR's claim was that, among others, the issuance of new shares to the second and the third defendants in the fifth defendant was unlawful and illegal because the company was under receivership and under the circumstances, no new shares could be issued.

[7] The solicitors in action at that time was Messrs Wan Jawahir & Co who obtained sanction from the OR to act on behalf of the plaintiff.

[8] On 12 May 2012, a firm known as Messrs Ahmad Rastom & Nayagam took over the matter from Messrs Wan Jawahir & Co.

[9] Messrs Ahmad Rastom & Nayagam then entered into a consent order (dated 7 October 2012 and 29 July 2012) with the defendants in which it was consented that a sum of RM2,300,000 from the balance of purchase price from a sale of the oil palm estate owned by the fifth defendant was to be paid to the second plaintiff, and the balance of the sale and purchase price of approximately RM14,500,000 was to be paid to the second and third defendants. Nothing was allocated to the first plaintiff. This new firm of Messrs Ahmad Rastom & Nayagam also agreed to withdraw the main suit of the first plaintiff without liberty to file afresh.

[10] Dissatisfied with the new solicitor's action, the first plaintiff through their new solicitor, Messrs Mohamed, Jargit & Partners filed an application for a declaration that Messrs Rastom & Nayagam had no sanction or authority to act for the first plaintiff *vide* encl. 46A and also applied to set aside the consent order, *vide* encl. 46B.

[11] On 23 March 2014, the High Court dismissed both the first plaintiff's applications in encl. 46A and encl. 46B. Now, before us the first plaintiff appealed against the said decision of the High Court.

The Appeal

[12] In this appeal, the issue raised by the appellant/first plaintiff has been; whether Messrs Ahmad Rastom & Nayagam who had purportedly acted for the appellant/first plaintiff, was validly appointed in the sense that did they have the authority and/or sanction from the OR to act for the appellant/first plaintiff.

[13] On the face of it, *ipso facto*, the answer to the question may appear to be straightforward. It was observed by the learned trial judge, and we think rightly so, that the sanction from the OR must be given to a specific solicitor to act accordingly. It was not open to the prior sanctioned solicitor to simply discharge himself and then appoint another solicitor to further act in his place without the new solicitor having first obtained the requisite sanction of the OR.

[14] The factual matrix in this case as could be seen above had adverted to the complaint by the appellant that Messrs Ahmad Rastom & Nayagam who had taken over the case from Messrs Wan Jawahir & Co did not have the required sanction to so act from the OR. It was a simple allegation, which, if it was proven to be so, would have seen its application in encl. 46A being granted by the learned trial judge.

[15] It had transpired that in order to prove that Messrs Ahmad Rastom & Nayagam had not obtained the required sanction from the OR, the appellant had produced the affidavit one Ahmad Fauzi Abdul Rahman affirmed on 16 January 2014. In fact, this was the affidavit in support of the application in encl. 46A that was filed on the complaint of non-sanction. Such averment had appeared at para. 8 of the said affidavit in support where he had affirmed as followed:

> (8) Saya oleh itu dinasihatkan oleh peguam Plaintif Pertama iaitu Peguamcara Tetuan Mohamed, Jargit & Partners dan sesungguhnya percaya bahawa Perintah Persetujuan bertarikh 7/10/2012 dan perintah bertarikh 21/7/2013 dan Penghakiman Persetujuan bertarikh 29/7/2013 adalah nullities terutamanya apabila Tetuan Ahmad Rastom & Nayagam telah kononnya menarik balik tindakan Plaintif Pertama terhadap semua Defendan-Defendan dengan melupuskan dan melucutkan hak legitimate, hak Plaintif Pertama dan tuntutan terhadap kesemua Defendan tanpa sebarang sanksi atau kebenaran daripada Pelikuidasi dan memasuki Penghakiman Persetujuan bagi pihak Plaintif Kedua dengan jumlah RM2,300,000.00 sedemikian menjejaskan hak kepentingan Plaintif Pertama.

[16] The same averment was again reiterated in paras. 4 and 7 of the afidavit balasan plaintif pertama dated 29 January 2014. Paragraph 4 therein had read as follows: "4) Menjawab kepada perenggan 6 afidavit tersebut, saya mengulangi dan mengesahkan bahawa pegawai penerima hanya melantik dan memberi sanksi/kebenaran kepada Tetuan Wan Jawahir & Co dan tidak pernah memberi sebarang sanksi/kebenaran kepada Tetuan Ahmad Rastom & Nayagam untuk mewakili plaintif pertama ataupun mengambil alih kes ini daripada Tetuan Wan Jawahir & Co, sedemikian pengambilan alih kes ini kononnya Tetuan Ahmad Rastom & Nayagam daripada Tetuan Wan Jawahir & Co dan kononnya pemfailan notis penukaran peguam cara bertarikh 12 Mei 2012 adalah tanpa pengetahuan pegawai penerima dan pelikuidasi plaintif pertama dan tidak sah sama sekali".

[17] In para. 7 of the same affidavit by Ahmad Fauzi, it was stated in the following terms:

> (7)(a) Menjawab perenggan 9(a) Afidavit tersebut saya mengulangi dan mengesahkan bahawa Pegawai Penerima dan Pelikuidasi plaintif Pertama tidak pernah memberi keizinan, sanksi/kebenaran kepada Tetuan Ahmad Rastom & Nayagam untuk mengambil alih kes ini daripada Tetuan Wan Jawahir & Co untuk mewakili Plaintif Pertama.

[18] Learned counsel for the respondents had objected by saying that there was nothing in the affidavit to show that the deponent Ahmad Fauzi bin Abdul Rahman had been authorised by the OR to affirm the affidavit alluding to such a material fact, on his behalf. All his averments to that effect were based on the advice he had received from his counsel. His objection was expressed quite emphatically in paragraph of the afidavit jawapan dated 22 January 2014, by Khuzamy Musa bin Muhammad, the second defendant in the action, where he had averred:

> 14. Saya sekeras-kerasnya menegaskan di sini bahawa mana-mana Perenggan Afidavit Sokongan Plaintif Pertama yang tidak diakui secara nyata di sini adalah dianggap dinafikan sekeras-kerasnya dan Plaintif Pertama dikehendaki memberikan bukti yang kukuh terhadapnya.

[19] It would therefore require this court to look at the evidence that was led in court by the plaintiff in order to establish that indeed there had been no sanction given by the OR.

[20] As regards encl. 46B, its genesis had close nexus with the issue of whether the legal firm who negotiated for the consent order that had binding effect on the appellant had obtained the necessary sanction from the OR. If the answer was in the negative, then the consent order would be a nullity *ab initio* and could be set aside. But that would depend on the proof of the fact that the legal firm of Messrs Ahmad Rastom & Nayagam was not properly clothed with the necessary sanction by the OR.

[21] It was the contention of the appellant that as the Messrs Ahmad Rastom & Nayagam was not sanctioned by the OR, it could not act on behalf of the respondents. The law, it was submitted before us was clear in that such act must be held to be a nullity and void *ab initio*, and if a court order was found to be illegally obtained on such account, it must be struck down. The case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 ("*Badiaddin* case") was cited in support by the appellant.

[22] Now, before the postulated question above could be answered, there was really a crucial fact that needed to be addressed. And that would be whether indeed the legal firm of Messrs Ahmad Rastom & Nayagam was not given the sanction by the official assignee. The facts showed that the said legal firm did in fact send letters to the official assignee for the necessary consent. The said firm had sent two letters to the official assignee dated 4 April 2012 and 8 May 2012 to Jabatan Insolvensi Malaysia purportedly requesting that it be allowed to continue from the Wan Jawahir sanction dated 28 December 2011. However there was no reply from the official assignee. As time was fast running out, the said firm proceeded to file notice of appeal on 12 April 2012 and had so proceeded henceforth for the first respondent in the various actions. As against this, the appellant had filed encl. 46A. The supporting affidavit thereto was affirmed by one Ahmad Fauzi bin Abdul Rahman on 16 January 2014 who at the material time was

a shareholder of the appellant to the tune of 0.0001% (or two shares only). As alluded to above, in his affidavit, he had averred to the effect that the said legal firm of Messrs Ahmad Rastom & Nayagam had not obtained any sanction from the OR. In his afidavit balasan dated 29 January 2014 he had repeated averments to similar effect. In both the affidavits affirmed by the said Ahmad Fauzi, no documents of any kind emanating, as it were, from the Jabatan Insolvensi Malaysia, were annexed thereto, that would tend to lend credence to his averments.

[23] The respondents had taken umbrage to that averment and argued that as that fact was within the knowledge of the OR, only the latter could state such averment. In this case, it was not shown in the affidavit by Ahmad Fauzi that he had the authority from the OR to aver that crucial fact regarding the status of Messrs Ahmad Rastom & Nayagam in relation to the sanction issue, on its behalf. With respect, we agreed with the submission by learned counsel for the respondents that there was merit in that argument. As a Government agency dedicated to deal with matters on insolvency and its attendant ramifications, such the need for sanction by an undischarged bankrupt, any information pertaining to the issuance or otherwise of a sanction must emanate from the Jabatan Insolvensi Malaysia. The facts in this case before us did not exhibit such a situation. Even assuming that the OR could outsource to a private individual to aver to such a fact on its behalf, in the circumstances of this case, there was nothing in the affidavit of Ahmad Fauzi having adverted to that fact. We had also borne in mind that despite having written to the OR, Messrs Ahmad Rastom & Nayagam had not received any response from the OR. As such, we were with the respondents that the status of the said firm could only be determined directly by the necessary averment to that effect by the OR. The evidence as it stood as per the affidavit in support by Ahmad Fauzi could not forward the appellant's case any further in discharging the burden on it of proving that the said legal firm had not obtained the necessary sanction to act the way it did. Taken in the light of the totality of the available evidence on the issue of sanction, it was merely a bare assertion by Ahmad Fauzi, without more.

[24] On that score alone, this appeal ought to fail. There was no evidence coming from the appellant before the court that the firm of Messrs Ahmad Rastom & Nayagam had not obtained the necessary sanction from the OR. In the cited case of *Badiaddin* (*supra*) it was also held that a court order, however imperfect, would remain valid and enforceable until it is set aside. We reproduce here the speech of the learned Justice Gopal Sri Ram (JCA) (as he then was) as follows:

> (7) As a general rule, orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. However, it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected.

[25] So, an impugned order will remain good until it is properly impeached by a competent court and set aside. Having said that, we were of the view that there was nothing to prevent the appellant from starting a writ action to prosecute its case against the respondents for the reliefs that it had sought for, if it so wished. In the same case of *Badiaddin* (*supra*) Justice Gopal Sri Ram had gone on to say:

> But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in **proceedings brought for that purpose**. It is then entirely open to the court, **upon the illegality being clearly shown**, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.
>
> (emphasis added)

[26] As a matter of reiteration, the appellant in this appeal had not shown as a matter of clear and positive averment and proof that the legal firm of Messrs Ahmad Rastom & Nayagam had not obtained the necessary sanction from the OR. We were of the view that there was merit in what was adverted to in para. 10 of the affidavit in reply dated 22 January 2014 where it was averred that the complaint directed at the matter of sanction, which was premised on an allegation of illegality, ought to have been pursued as a new action by way of a writ, instead of as an off-shoot of an existing main cause of action. In light of the rather murky state of affairs pertaining to that factual circumstance, a writ action, where *inter vivos* evidence would be the order of the day, may well be the better mode to ventilate this contentious matter.

[27] As regards to encl. 46B, in the factual matrix of this case, it was shown to us that there was no valid evidence to establish that factual circumstance asserted by the appellant before the court. As such, encl. 46B was rightly dismissed by the learned High Court Judge, *albeit* on a different premise. Its success was dependent upon the issue of sanction as well.

Conclusion

[28] In the upshot, we therefore dismissed the appeal against the decision of the learned judge of the High Court. We saw no reason to disturb his findings thereto. As alluded to above, the appellant would be at liberty to file a fresh action by way of writ, if it so wished. We had awarded costs of RM7,500 to the first respondent, and RM7,500 to the second to fifth respondents, globally. We had so ordered.